

## STATE OF VERMONT

## HUMAN SERVICES BOARD

In re ) Fair Hearing No. 14,607

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Appeal of )

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INTRODUCTION

The petitioner appeals a decision of the Department of Social Welfare denying her request to replace a fuel assistance check which she failed to cash within sixty days.

FINDINGS OF FACT

1. The petitioner is a woman who lives with her fourteen-year-old son and receives disability benefits, Food Stamps and fuel assistance. She also works part-time and receives child support. Her disability is based on bipolar (manic/depressive) disorder, a mental illness.
2. The petitioner received a supplemental fuel assistance check dated February 8, 1996, for \$112 sometime in early February of this year. The check stated on its face that it was "void after 60 days". The petitioner put the check in her wallet and forgot about it.
3. The petitioner discovered the check in August of 1996 and took it to her fuel dealer for a credit toward her fuel bill for the upcoming winter. In early September, her fuel company notified her that the Department of Social Welfare would not honor the check because it was stale. The petitioner asked the Department to issue a replacement check but was informed on September 26, 1996, that it was Departmental policy not to issue replacement fuel checks under any circumstances. The petitioner appealed that decision on October 15, 1996.
4. The petitioner was on medication for her illness in February of 1996 but was beginning to experience symptoms of mania. She felt a high level of energy, was able to do her job and did a lot of reading but was getting very little sleep. Nevertheless, she continued to pay her rent and other bills for the next few weeks and to take care of her son. She was not out of fuel and so did not think about the fuel check. She also did not see the check because she did not have it in her "bill basket" with her other bills.
5. The petitioner's condition gradually worsened until she was hospitalized on May 8, 1996 for two weeks for hypomania. Following her discharge, she presented again at the emergency room on June 10, 1996 and was treated for depression after threatening suicide and was discharged into a home mental

health support program. The petitioner was readmitted to the hospital for another two weeks on July 27, 1996 for depressive symptoms. Following her discharge in August, she discovered the fuel check in her wallet when she was organizing her finances.

6. The evidence offered by the petitioner does not establish that she was prevented by her mental illness from negotiating the fuel assistance check between February 8 and April 8, 1996 or in participating in the fuel program in general. At best, the evidence offers an explanation as to why the petitioner may have forgotten that she had the check in her wallet.

### ORDER

The decision of the Department is affirmed.

### REASONS

Regulations adopted by the Department governing the payment of fuel assistance benefits state:

Any check which is not cashed or presented to an energy provider within 60 days from the date of issue will be forfeited. Lost checks will be replaced only if the loss is reported within the 60-day period and shall be subject to recoupment in the event the lost check is subsequently found to have been properly endorsed and cashed.

W.A.M. § 2906

The facts clearly show that the petitioner did not present the check within sixty days of February 8, 1996, the date of issue. The Department's decision is supported by its regulation and must be upheld unless the regulation is in violation of some other federal or state law or regulation.

The petitioner argues that the above regulation is unfair to her because she claims she was unable to cash the check due to her mental illness. However, the facts show that while the petitioner may have had some difficulty dealing with her life during that period she was still handling her finances and other responsibilities. There is nothing which would indicate that her disability per se kept her from negotiating the check.

As a person with a mental disability, the petitioner is undoubtedly protected by the Americans with Disabilities Act. The Board has reviewed this provision under that Act and held in a similar case, Fair Hearing No. 11,958, that in the circumstance where the petitioner cannot show that the disability prevented her from meaningful participation in the program the above non-replacement provision does not violate the ADA and due process provisions. The Board's decision in that case is set forth as follows:

The ADA at 42 U.S.C. § 12132 provides that:

Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

In this case there is no dispute that the Department is a "public entity" within the meaning of the Act.

See 42 U.S.C. § 12131(1). There is also no dispute that the Department, as a recipient of federal funding, is also subject to the similar anti-discrimination provisions of section 504. See 29 U.S.C. § 794.

28 C.F.R. § 35.130(b)(7) provides:

A public entity shall make reasonable modifications in policies, practices, or procedures when the modifications are necessary to avoid discrimination on the basis of disability, unless the public entity can demonstrate that making the modifications would fundamentally alter the nature of the service, program, or activity.

In promulgating federal regulations to implement the ADA the U.S. Attorney General commented that the following practices were prohibited:

. . . blatantly exclusionary policies and practices that are neutral on their face, but deny individuals with disabilities an effective opportunity to participate. 56 F.R. 35694, 35704 (1991). Those comments make specific reference to Alexander v. Choate, 469 U.S. 287 (1985), a United States Supreme Court case decided prior to the enactment of the ADA that considered whether certain time limitations on inpatient hospital coverage under medicaid discriminated against the handicapped in violation of section 504. The comments specify that the anti-discrimination provisions of the ADA are consistent with those in section 504 as interpreted in Choate. Id.

In Choate, the Supreme Court adopted a "meaningful access" test to determine that a "facially neutral" provision in the Tennessee medicaid regulations that limited inpatient hospital coverage to fourteen days did not discriminate against handicapped individuals. Id. at 301. In that case the basis of the plaintiffs' argument was that as a general matter handicapped individuals required longer hospital stays. However, in rejecting this argument the Court concluded that ". . . nothing in the record suggests that the handicapped . . . will be unable to benefit meaningfully from the coverage they will receive under the 14-day rule". Id. at 302. However, the Court also made clear that there may well be circumstances in which ". . . reasonable adjustments in the nature of the benefit offered must at times be made to assure meaningful access". Id. at

301, footnote 21.

This case is indistinguishable from Choate. Allowing that the petitioner's disability falls under the protections of the ADA (see Id. § 12131[2]), the 60-day limit on cashing checks did not prevent him from "meaningful access" to the supplemental fuel program. Like the plaintiffs in Choate who argued that people with disabilities usually require hospital stays longer than the 14-day limit that was at issue in that case, it might be found that people with certain disabilities are more likely than others to fail to comply with the 60-day limit to cashing fuel checks. This does not mean, however, that the rule violates the ADA. The petitioner's "memory impairment" may explain why he did not, in this one instance, cash this particular check in a timely manner, but there has been no showing this his disability prevented him from being able to comply with the 60-day limit. Therefore, it cannot be concluded that the rule, per se, denied him "an effective opportunity to participate" in the program. See Fair Hearing Nos. 11,260 and 11,648. Similarly, the 60-day provision does not violate the constitutional due process rights of disabled individuals. In Canales v. Sullivan, 936 F 2d 755 (2d Cir. 1991), cited by the petitioner, the court held that SSI applicants constitute an "unusually protect(ed)" class of individuals who must be allowed to argue that their disability prevents them from complying with the statutory time limitations regarding

SSI appeals. As noted above, it cannot be found in this case that the petitioner's disability prevented him from cashing the check on time.

Moreover, unlike SSI, no such "unusual protect(ion)" is either implicit in the fuel assistance statutes or required as a matter of fundamental fairness. The purpose of the fuel assistance program is "to help eligible households with home heating expenses". W.A.M. § 2900. There is no allegation that the petitioner has gone without heat (or any other necessity) by virtue of the Department not replacing this particular fuel check. Nor has the petitioner's ongoing eligibility for fuel assistance been affected. Except for the single check in question, he has had full access to and the full benefit of the program--including the "emergency" provisions (at W.A.M. §§ 2950 et seq.) if his failure to cash the check in question caused him to have an "emergency need" for fuel.

For the same reasons, the Department's decision in this matter is affirmed.

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